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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE CARMEN GOMEZ,

Defendant and Appellant.

G057516

(Super. Ct. No. 02CF1529)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Kimberly Menninger, Judge. Affirmed.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant
and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters and Susan Sullivan
Pithey, Assistant Attorneys General, Amanda V. Lopez and Nicholas J. Webster, Deputy
Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Jose Carmen Gomez of second degree murder (Pen. Code, § 187)¹ and found that he was vicariously armed with a firearm in the commission of the offense (§ 12022, subd. (a)(1)). The jury also found defendant's codefendant guilty of first degree murder. (*People v. Carrillo* (July 13, 2006, G033808) [nonpub. opn.].) The court found true allegations that defendant's crime was committed at the direction of or in association with a criminal street gang (§ 186.22, subd. (b)(1)). (*Carrillo, supra*, G033808.) The court sentenced defendant to an indeterminate term of 15 years to life for the murder conviction and a consecutive one-year term for the firearm enhancement. We affirmed defendant's conviction on appeal, rejecting his numerous arguments, including that he was denied due process of law by a delay in prosecution and by prosecutorial misconduct. (*Carrillo, supra*, G033808.)

In February 2019, defendant filed a petition for resentencing pursuant to section 1170.95, which the court summarily denied. On appeal, defendant contends the court erred by denying his petition and by failing to appoint counsel prior to its prima facie review of the petition. For the reasons below, we disagree and affirm the postjudgment order.

FACTS

In February 2019, defendant filed a petition for resentencing pursuant to section 1170.95. Using a preprinted form, he checked boxes stating: (1) "A complaint, information, or indictment was filed against [him] that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine"; (2) "At trial, [he] was convicted of 1st or 2nd degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine";

¹

All further statutory references are to the Penal Code.

and (3) “[He] could not now be convicted of 1st or 2nd degree murder because of changes made to [sections] 188 and 189, effective January 1, 2019.” Defendant also requested the court appoint counsel for him during the resentencing process.

The court summarily denied defendant’s petition and explained: “The petition does not set forth a prima facie case for relief under the statute. A review of court records indicates defendant is not eligible for relief under the statute because the defendant does not stand convicted of murder or defendant’s murder conviction(s) is not based on felony-murder or on a natural and probable consequences theory of vicarious liability for aiders and abettors.” Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends the court erred by denying his petition for resentencing because the petition makes a prima facie showing that he is eligible for relief under section 1170.95. Defendant claims the court’s conclusion that he “was not convicted under theories of felony-murder or natural and probable consequences is contrary to what he alleged in his petition” He also argues the court erred by failing to appoint counsel to represent him.

The court did not err. Because defendant was not convicted of second degree murder pursuant to the felony-murder rule or the natural and probable consequences doctrine, he failed to establish a prima facie showing that he fell within section 1170.95. The court also was not required to appoint counsel for defendant at the prima facie review stage. We accordingly affirm the postjudgment order.

Section 1170.95, subdivision (a), provides, in relevant part, “A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts” The

statute also sets forth the procedure to be followed by the trial court: “The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” (*Id.*, subd. (c).)

In its initial review of whether a petitioner has made a prima facie showing, the court examines whether the petitioner has stated his or her eligibility for relief. The petitioner must allege: (1) an accusatory pleading was filed against him or her allowing prosecution under the felony-murder rule or the natural and probable consequences doctrine (§ 1170.95, subd. (a)(1)); (2) he or she was convicted of murder following trial, or pleaded guilty to murder in lieu of a trial at which he or she could have been so convicted (*id.*, subd. (a)(2)); and (3) he or she could not be convicted of murder after the 2019 amendments to sections 188 and 189 (§ 1170.95, subd. (a)(3)). If the petitioner is ineligible for relief, the court may summarily deny the petition. Relief under section 1170.95 is available only to those “‘convicted of felony murder or murder under a natural and probable consequences theory’” (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

Defendant claims the court erred by looking beyond his petition to evaluate his prima facie showing. According to defendant, the court could not consider “unspecified ‘court records’” to conclude defendant’s second degree murder conviction was not based on felony murder or a natural and probable consequences theory. Other courts have rejected this argument. In *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137, review granted March 18, 2020, S260598, the court held that (1) a trial court may rely on the record of conviction in determining whether the defendant’s petition makes a

prima facie showing that he or she falls within the provisions of the statute, and (2) the record of conviction includes the opinion of the Court of Appeal in the underlying conviction. The courts in *People v. Verdugo* (2020) 44 Cal.App.5th 320, 329, review granted March 18, 2020, S260493 and *People v. Torres* (2020) 46 Cal.App.5th 1168, 1178, review granted June 24, 2020, S262011 similarly held the trial courts could look beyond the petition to determine a petitioner's prima facie case for eligibility. Pending further guidance from our Supreme Court, we likewise conclude the court did not err by considering the record of conviction to determine whether defendant stated a prima facie case of eligibility for resentencing under section 1170.95.

Here, our record includes the jury instructions used in defendant's trial. Notably, the jury was *not* instructed on the natural and probable consequences theory of aiding and abetting liability. Nor was the jury instructed on the felony-murder rule. Because these are the *only* theories of conviction that can form the basis of a section 1170.95 resentencing petition, the court did not err by denying defendant's petition.²

Finally, defendant contends the court erred by failing to appoint counsel for him before denying the petition. Once again, other courts have rejected this argument and concluded a trial court does not have to appoint counsel prior to its initial prima facie review. (*People v. Lewis, supra*, 43 Cal.App.5th at p. 1140, review granted [“[T]he trial court's duty to appoint counsel does not arise unless and until the court makes the threshold determination that petitioner ‘falls within the provisions’ of the statute”]; see *People v. Tarkington* (2020) 49 Cal.App.5th 892; *People v. Verdugo, supra*, 44

² Defendant also makes a cursory argument that the court violated his due process rights because it relied on “unspecified ‘court records,’” which did not provide adequate notice to defendant to challenge the ruling. But defendant's argument is not developed, nor is it made under a separate heading as required by California Rules of Court, rule 8.204(a)(1)(B). And on appeal, defendant makes no attempt to show that something (anything) in the record of conviction would suggest he was convicted under the felony-murder rule or the natural and probable consequences theory. The reason is clear. Defendant's petition makes patently false allegations.

Cal.App.5th at pp. 332-333, review granted; *People v. Torres, supra*, 46 Cal.App.5th at p. 1178, review granted; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58, review granted Mar. 18, 2020, S260410.) Pending further guidance from our Supreme Court, we agree with these cases.

DISPOSITION

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.